

SERVED: May 1, 1995

NTSB Order No. EA-4353

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of April, 1995

_____)	
RICHARD BROSS THOMPSON,)	
)	
Applicant,)	
)	
v.)	
)	Docket 208-EAJA-SE-11889
DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the decision of Administrative Law Judge William E. Fowler, Jr., served on September 8, 1994, granting, in part, Mr. Thompson's application for attorney fees and expenses, pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, in the amount of \$24,526.35.¹ We grant the appeal, in part.

¹Applicant requested reimbursement of \$58,128.90.

In October 1991, the Administrator revoked applicant's airman certificates for alleged violations of sections 61.18 and 61.37 of the Federal Aviation Regulations (FARs), 14 C.F.R. Part 61. Applicant filed a motion to dismiss the complaint as stale, which the law judge granted on August 5, 1991. In Administrator v. Thompson, NTSB Order No. EA-4170 (1994), the Board affirmed the dismissal of the Administrator's order. The law judge later granted, in part, Mr. Thompson's application for attorney fees and expenses, finding that the Administrator's position in this case was not substantially justified. The subject appeal ensued.²

First, the Administrator claims, and applicant concedes, that the fees and expenses paid to Messrs. Moore and Faulk, consultants on the case, are not recoverable. See Conner Airlines v. Administrator, 6 NTSB 1046, 1047 (1989). We agree and deduct \$917.47 from applicant's EAJA award.

Next, according to the Administrator, the law judge should have denied recovery of fees for the preparation of several motions and a "supplemental brief" submitted to the law judge in the underlying case. He maintains that the issues discussed and arguments made in these submissions were moot and/or would not have prevailed, given the facts of the case. We decline, however, to second-guess the strategy employed by applicant's

²The Administrator, contending that the EAJA award should not exceed \$9,284.74, appeals only the amount awarded, not the law judge's finding that the Administrator lacked substantial justification to pursue this case.

counsel or to rate all the alternative legal arguments he made on behalf of his client. We have not found that the motions and brief were frivolous, a determination that is enough for our purposes here.

The Administrator also objects to the related copying expenses of the above-referenced motions and brief, claiming that the submitted \$1,502.50 was "grossly excessive" and unreasonable.³ While photocopying charges are expenses that properly may be reimbursed under EAJA,⁴ we must agree that in the instant case, the supporting documentation supplied by the applicant, namely, an entry in the June 25, 1991 invoice, identified only as "05/24/91 Photocopying expense" in the amount of \$1,502.50, is not specific enough to permit reimbursement, given the unusually large sum billed for this service. Our rules require "full documentation of the fees and expenses." 49 C.F.R. § 826.23. At the very least, there should be an explanation of the number and subject of copies produced that resulted in a charge in excess of \$1,500.⁵ Therefore, we will reduce the

³It appears that applicant received monthly invoices from his counsel. The invoice dated March 25, 1991 contained a charge of \$10.75 entered on 2/25/91 for "Photocopying expense." The invoices dated April 25 and May 24, 1991 did not contain a photocopying charge, while the invoice dated June 25, 1991 contained a charge of \$1,502.50 for "Photocopying expense." Application of Richard Bross Thompson for Fees and Expenses, June 17, 1994, Attachment 6.

⁴See, e.g., Aston v. HHS, 808 F.2d 9, 12 (2d Cir. 1986).

⁵At 15 cents per page, that would be more than 10,000 duplicated pages, a large amount deserving of an explanation. While we recognize that, as applicant points out, citing Unemployed Workers Organizing Committee v. Batterton, 477 F.Supp.

amount allowed for this expense by \$1,126.95 to \$375.55, as requested by the Administrator.⁶

Included in the amount awarded by the law judge are fees incurred by applicant in a petition to the Board for rulemaking to increase the \$75-per-hour fee cap on the amount of recoverable attorney fees. Citing C & M Airways, Inc. v. Administrator, NTSB Order No. EA-3332 (1991), the Administrator argues that a petition for rulemaking is beyond the scope of a Board adjudication and any related expenses incurred are noncompensable. Applicant replies that his case differs from C & M Airways because, unlike that case, this petition was successful and resulted in a change of the rules.⁷ Thus, he argues, he should be compensated for attorney fees and expenses.

The NTSB rules adopted to administer the EAJA permit recovery of attorney fees and other expenses, under specific circumstances, by "parties to certain administrative proceedings (**adversary adjudications**)."

49 C.F.R. § 826.1 (emphasis added).

Adversary adjudications include aviation enforcement cases

(..continued)

509, 515 (D.Md. 1979), it is not our function to second-guess each minute detail of an attorney's work on a case, neither is it a responsible exercise of our review function to approve the reimbursement of expenses that appear excessive and are inadequately documented.

⁶In his reply brief, the applicant did not specifically address the Administrator's contentions regarding these particular copying expenses or attempt to substantiate them.

⁷See Equal Access to Justice Act Fees, 48 FR 21543 (April 22, 1993). Under 49 C.F.R. § 826.6, the maximum recoverable hourly fee is increased consistent with the rate of inflation.

appealed to the Board where the FAA is represented by an attorney. 49 C.F.R. § 826.3(a). While the Board is free to designate a proceeding as an adversary adjudication for purposes of the EAJA, an agency rulemaking is not an appropriate situation for the exercise of that discretion.

The EAJA references adversary adjudications as discussed in the Administrative Procedure Act (APA), 5 U.S.C. § 554. Under the APA, an adjudication is "an agency process for the formulation of an order," while a rulemaking is an "agency process for formulating, amending, or repealing a rule." *Id.*, § 551(7) and (5).⁸ An order is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in **a matter other than rule making** but including licensing."⁹ *Id.* at § 551(6) (emphasis

⁸As defined in the APA, a rule is

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing."

5 U.S.C. § 551(4).

⁹See, e.g., *American Express Co. v. U.S.*, 472 F.2d 1050 (C.C.P.A. 1973), also discussing the difference between an agency adjudication and a rulemaking. In *American Express*, the court, after referring to the Administrative Procedure Act, Legislative History, 79th Congress 1944-46 (hereinafter History) and Attorney General's Manual on the Administrative Procedure Act, 1947 (hereinafter Manual) stated:

added). We believe these definitions are plain in their meaning.

Accordingly, we grant the Administrator's request to exclude attorney fees and expenses for services related to applicant's petition for rulemaking. As applicant has not argued in his reply that the Administrator's computation of the fees and expenses related to the petition for rulemaking is erroneous, we will accept the amount advanced by the Administrator as accurate.¹⁰ Consequently, we deduct fees and expenses in the amount of \$2,594.62.¹¹

In his "Opposition to Application for Attorney Fees under the Equal Access to Justice Act," dated July 18, 1994, the Administrator argued that the law judge should disallow

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[R]ule making is legislative in nature (History, pp. 193, 251, 353; Manual, pg. 14), is primarily concerned with policy considerations for the future rather than the evaluation of past conduct (History, pg. 355; Manual, pg. 14), and looks not to the evidentiary facts but to policy-making conclusions to be drawn from the facts (Manual, pg. 14). On the other hand, adjudication is judicial rather than legislative in nature (History, pp. 193, 251, 353, 355), has an accusatory flavor and may result in some form of disciplinary action (History, pp. 353, 408; Manual, pg. 14), and is concerned with issues of fact under stated law (History, pg. 353; Manual, pp. 14-15).

472 F.2d at 1055.

¹⁰The Administrator asserts that \$1589.38 and \$1005.24 should be deducted as fees and expenses related to the petition for rulemaking. Complainant's brief at 10-11. The applicant did not dispute the validity of these totals.

¹¹We also have reviewed the Administrator's arguments for the further reduction of the EAJA award for various miscellaneous fees and expenses but deny his appeal on those issues.

\$18,552.58 in fees claimed for work performed by applicant's attorney in non-Board proceedings related to the charges before the Board. The law judge agreed, but then stated, he had "calculated the fees to be disallowed [to be] more than the \$18,552.58 stated in the Administrator's brief; however the reduction will be limited to the amount requested by the Administrator." Initial Decision at 10. The Administrator asserts on appeal that the law judge erred in not disallowing the higher amount that the law judge had calculated, whatever it may have been, and requests that the Board remand the case to the law judge for the purpose of deducting the undisclosed sum from the fee award.

Although we do not wish to unduly prolong the resolution of this case, we are obligated, as are our law judges, to ensure that only eligible fees, as authorized by statute, are awarded under the EAJA. Eligible fees are those resulting from an adversary adjudication. Consequently, we must remand the case to the law judge solely for the determination of amount of deduction from the fee award for fees and costs incurred in proceedings not conducted by the Board, and for a determination of an award for fees and expenses incurred in this EAJA appeal.¹²

¹²Applicant may supplement his application to provide documentation for these fees and expenses.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted, in part, reducing the law judge's EAJA award by \$4,639.04; and
2. The case is remanded to the law judge for clarification of his comment regarding the amount of fees and expenses disallowed for the period July 1991 to March 1993 and computation of allowable fees and expenses incurred in this appeal.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.